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Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY MOLINA,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS 1ST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

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March 1989

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QUESTIONS PRESENTED

1. On its face and as applied to the Petitioner, is Houston Municipal Ordinance No. 85-1337 unconstitutionally vague and violative of the First and Fourteenth Amendments to the Constitution of the United States?

2. On its face and as applied to the Petitioner, is Houston Municipal Ordinance No. 85-1337 unconstitutionally overbroad under the First and Fourteenth Amendments to the Constitution of the United States?

3. On its face and as applied to the Petitioner, does Houston Municipal Ordinance No. 85-1337 violate due process of law protections in violation of the Fourteenth Amendment to the Constitution of the United States?

4. On its face and as applied to the Petitioner, does Houston Municipal Ordinance No. 85-1337 violate free speech protections and constitute an impermissible prior restraint on free speech, in violation of the First and Fourteenth Amendments to the Constitution of the United States?

LIST OF INTERESTED PARTIES

1. Anthony Molina, (14-88-00441-CR) - (1265-88)
2. Charles Rice Young, Attorney for Petitioner.
3. Ronnie Beylotte, Assistant City Attorney, City of Houston, Texas.
4. Gilbert Douglas, Assistant City Attorney, City of Houston, Texas.

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THE STATE OF TEXAS,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS 1ST SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the First Court of Appeals of The State of Texas and the Orders of the Court of Criminal Appeals of the State of Texas, entered November 30, 1988 (Motion for Rehearing denied January 25, 1989) refusing to accept the Petition for Discretionary Review of said opinion.

CITATION TO OPINION BELOW

The Court of Criminal Appeals refused Petitioner's Petition for Discretionary Review by unpublished Orders dated November 30, 1988, under Case Number 1265-88. The official notice is attached as Appendix "A". The Court of Criminal Appeals denied Petitioner's Motion for Rehearing on January 25, 1989. The official notice of the denial is attached as Appendix "B". The opinion of the First Court of Appeals, which is unpublished, was delivered on October 27, 1988 and is attached as Appendix "C".

JURISDICTION

Jurisdiction of this Court is invoked under State Courts; Appeal; Certiorari, 28 U.S.C. § 1257(3) (1984), Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involved the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner is accused of operating an adult arcade in the City of Houston. The Petitioner filed a motion to quash which was considered and denied by the Municipal Court. The Petitioner did not present evidence on his own behalf. In a court trial the Municipal Court rendered a verdict of guilty and the Court assessed punishment at a $750.00 fine.

ARGUMENT

VAGUENESS

In the Motion to Quash the Complaint, the Petitioner complained that City of Houston Ordinance No. 85-1337 is, in many particulars, constitutionally infirm and also complained that the complaint accusing him of illegal conduct is likewise, constitutionally infirm.

The Municipal Court overruled the motion and also overruled Petitioner's Motion for New Trial which re-urged the motion to quash.

In a number of specific respects the Ordinance is so open-ended and imprecise in that it provides virtually no ascertainable legal standard at all. Such imprecision in a law regulating presumptively protected First Amendment activities on the basis of the content of motion pictures exhibited is constitutionally insupportable.

The void-for-vagueness doctrine, as applied to criminal statutes, serves two separate and distinct functions. First, it imposes a general requirement of linguistic specificity to assure fair notice to those whose conduct is within the intendment of the law. Secondly, and even more importantly, it demands that sufficiently precise restraints be imposed upon the exercise of discretion by law enforcement authorities to prevent or at least to minimize the potential for arbitrary and capricious official action.

The two separate and distinct considerations have been succinctly articulated by the Supreme Court's decision in *Kolender v. Lawson*, 461 U.S. 352 (1983):

> "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal

> offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. * * * Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recently recognized that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' [Smith v. Goguen, 415 U.S. 566, 574 (1974)]. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections' (citations omitted)." at pg. 357-358.

Moreover, the "general test of vagueness applies with particular force in review of laws dealing with speech * * * [and] '[s]tricter standards of permissible statutory vagueness may be applied to a statute having potentially inhibiting effect on speech'." *Hynes v. Mayor and Council of the Borough of Oradell,* 425 U.S. 610, 620 (1976); see also *Buckley v. Valeo,* 424 U.S. 1, 76-82 (1976); *Broadrick v. Oklahoma,* 413 U.S. 601, 611-12 (1973); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972). Criminal statutes or ordinances penalizing "pure speech" (as opposed to conduct alone, or conduct accompanied by speech) are necessarily subject to the most rigorous standard of First and Fourteenth Amendment review. *Winters v. New York,* 333 U.S. 507, 515 (1948). *Smith v. Goguen,* 415 U.S. 566 (1974).

The standard governing what constitutes unconstitutional vagueness is succinctly set forth in *City of Webster v. Signad, Inc.,* 682 S.W.2d 644, 646 (Tex. App.—

Houston [1st Dist.] 1984, writ ref'd n.r.e.): "When persons of common intelligence are compelled to guess at a law's meaning and applicability, due process is violated and the law is invalid. *Texas Antiquities Committee v. Dallas County Community College District*, 554 S.W.2d 924, 928 (Tex. 1977) (holding the term 'of historical interest' to be unconstitutionally vague)." That case further explains that, "a statute or ordinance is violative of due process and fatally vague when persons regulated by it are exposed to some risk or detriment without fair warning of the nature of the proscribed conduct. *Texas Liquor Control Board v. The Antic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970)." *Id.*

Applying those standards to the ordinance at issue in this case, the vagueness problems with Ordinance No. 85-1337 are as follows:

(1) *Is it unlawful to own a business or a building"?* Section 28-81 of the Ordinance defines "an adult arcade" as "any *'premises'* to which members of the public or members of any club, group or association are admitted and permitted to use one or more 'arcade devices' (emphasis added)." In turn, the term "premises" is defined as "a building . . ." Thus, an "adult arcade" is necessarily a "building".

The operative proscriptions of the Ordinance are contained in Section 28-91 thereof, which makes it "unlawful for any person to own, operate, manage or conduct any business in an adult arcade unless there is a permit for the adult arcade." The question is, is it unlawful to own a *building*, or unlawful to own a *business* in a building? That is, is it unlawful to own . . . an adult arcade, operate . . . an adult arcade, manage . . . an adult arcade,

or conduct any business in . . . an adult arcade, or does the ordinance instead prohibit own[ing] . . . any business in (an adult arcade), operat[ing] . . . any business (in an adult arcade), manag[ing] . . . any business (in an adult arcade), or conduct[ing] . . . any business (in an adult arcade)? Self-evidently, the ordinance is completely unclear and the foregoing inquiry is unanswerable by reference to the literal language of the Ordinance.

The case is indistinguishable from and controlled by *Sheppard v. Giebel,* 110 S.W.2d 166 (Tex. Civ. App.—Austin 1937, no writ). In that case, because there was indefiniteness and uncertainty as to "whether it be the owner of the title to such machines, the ones in possession of them, or the person on whose premises they were exhibited", 110 S.W.2d at 171, upon whom the obligations of the statute devolved, the law was declared to be unconstitutional, for contravention of Article I Section 10 of the Constitution of Texas. The present case is indistinguishable in principle from *Sheppard,* and the same result must obtain.

(2) *What is the meaning of "dispensing entertainment"?* The Ordinance (Sec. 28-81 - arcade device) defines an "arcade device" as, essentially, any machine or device "that *dispenses* or effectuates the *dispensing* of entertainment, that is intended for the viewing of five (5) or fewer persons in exchange for any payment of any consideration (emphasis added)." What precisely, if anything, does this mean?

Clearly, the term "dispense" ordinarily connotes a distribution in discrete units. Indeed, that is the dictionary definition of the term "dispense"—that is, "to deal out in portions." For example, a mechanical device that

would "dispense" videotape cassettes—much like a cigarette machine dispenses packages of cigarettes—would clearly come within such a definition.

"Dispensing" is a particular type of distributing, which entails discrete portions being distributed. In that context, the meaninglessness of the term "dispense entertainment", as used in the Ordinance, becomes apparent. "Entertainment" means any live exhibition, display or performance, or any still pictures or movie pictures, however displayed (in which specified sexual activities are depicted). "Distribution" (and therefore dispensing) is a distinct activity from either "performing", "displaying" or "exhibiting". A play can be "performed"; a motion picture can be "displayed" or "exhibited". A play cannot be "dispensed", and neither can a movie picture (except, of course, in the here inapplicable sense of selling the movie itself via some kind of a dispensing machine). These definitions are most usefully explained in the context of copyright law. See, e.g., 17 U.S.C.A. § 106.

In the context of the present case, however, the term "dispense entertainment" is wholly meaningless. Does a traditional movie threater "dispense" movie pictures? Clearly, it does not; it *displays* or *exhibits* them. What, then, distinguishes the operation of a traditional movie theater (which cannot, in any meaningful sense, be said to "dispense entertainment") from the operation of "arcade devices" in the case at bar. Does a television set "dispense" t.v. shows? Again, the answer is self-evident, at least in common usage of the terms, yet no rational explanation justifies a different conclusion with regard to adult arcade devices which are, basically, essentially and merely, coin-operated television sets or movie projectors.

Clearly an *exhibition* or display of motion pictures is not in any meaningless sense equivalent to a dispensation of chewing gum, cigarettes, candy bars or a myraid of other products ordinarily associated with vending machines as such. If, as the City maintains, the devices "dispense" entertainment, the meaning of that term is a mystery.

(3) *What is the meaning of "intended to be viewed by five (5) or fewer persons"?* Even if it can be said that the arcade devices here in issue "dispense" motion pictures, the Ordinance (Sec. 28-81 - arcade device) does not delineate what is meant by the phrase "intended for the viewing of five (5) or fewer persons." First of all, *whose* intent is relevant in this regard? Is it the producer or distributor of the adult videotape or film that is being allegedly "dispensed" in the adult arcade? In particular, if the producer, distributor or exhibitor of an adult film or videotape intended for the *film* to be exhibited ultimately to far more than five people, does this exempt the device displaying the motion picture from the definition of an "arcade device" under the Ordinance?

By the same token, the phrase "intended for viewing by five or fewer persons" does not specify the relevant time frame within which such viewing by such five or fewer persons must have occurred. Does the phrase refer to a movie (or other "entertainment") intended to be viewed by five or fewer persons per day? Does it refer to a movie intended to be viewed by five or fewer persons per showing? Does it refer to a movie intended to be viewed by five or fewer persons in the life of the movie (such as, perhaps, a so-called "home movie")? Does it refer to a movie *intended* to be viewed by no more than five persons at a time (i.e., simultaneously)? This ordi-

nance simply gives no adequate notice of which this cryptic phrase means.

These questions are of extraordinary significance in view of what appears to be the only legal authority concerned with a similar ordinance, i.e., the case of *EWAP, Inc. v. City of Los Angeles,* 158 Cal. Rptr. 579 (Ct. App., 1979). The Californa Court of Appeals sustained against various constitutional and legal challenges a Los Angeles arcade ordinance which specifically was limited to "arcade devices" that "are maintained to show still or motion pictures to five or fewer persons per machine *at any given time*" (emphasis added). 158 Cal. Rptr. at 581, n.1.

The Los Angeles ordinance at least attempted on its face precisely to delimit the regulation to constitutional proportions by specifying precisely both the numbers of persons *and* the time interval of the exhibition. The Houston Ordinance, by contrast, leaves its interpretation entirely to speculation and guesswork.

In a like manner, the Ordinance does not reveal whether the phrase "intended to be viewed by five or fewer persons" refers to the film or to the device. Grammatically, the phrase "that is intended for the viewing of five or fewer persons" modifies "entertainment". In other words, if the movie (or live exhibition) is intended to be viewed by more than five persons, the machine which exhibits it is not an "arcade device" under the Ordinance, irrespective of the characteristics of that machine (i.e., if the machine is only capable of displaying the film, effectively, to five or fewer persons at a time). On the other hand, if for some obscure reason the film is "intended for the viewing of five or fewer persons", the movie projector which displays it is ap-

parently an "arcade device" even if exhibition takes place in a coliseum-sized theater.

The truth of the matter is that what the City *probably* intended to regulate was the display or exhibition of motion pictures in *booths* intended to be occupied by five or fewer persons at a time, irrespective of the intent of the movie maker or the capabilities of the projector. Cf. *Ellwest Stereo Theaters, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir. 1982). But the City of Houston did not do that. What it did was to define an arcade device as a coin-operated machine that "dispenses" entertainment that is intended for the viewing of five or fewer persons. "Courts must take statutes as they find them." *Rudman v. Railroad Commission of Texas,* 162 Tex. 579, 348 S.W.2d 717 (1961). This Ordinance, in its present form, is simply indecipherable.

(4) *What is "an unobstructed view of every area of the adult arcade to which any patron is permitted access"?* Section 28-101(a) of the Ordinance essentially demands that the *building* in which an adult arcade is located provide an unobstructed view of every public area. To the extent that adult arcades in Houston are operated in conjunction with an adult bookstore - adult videotape rental/sales business, such a regulation is self-evidently constitutionally overbroad, as will be hereinafter demonstrated.

For present purposes the question is what is "an unobstructed view"? Virtually any room or other enclosed area of a public facility (such as a courtroom) contains areas "to which [any member of the public] is permitted access" which are not susceptible of unobstructed view from one centralized location within the room. Within the context of the City's attempt to regulate adult arcades,

how rigorously is this standard to be enforced? Theoretically, given the nature of the business premises and the numerous racks or stands upon which adult magazines, books and videotapes are displayed, such a requirement would demand a multitude of individual "managers" to supervise every patron's activity throughout any portion of the establishment, even if only a relatively small proportion of the business was devoted to an adult arcade. The ultimate decision, of course, rests with the "cop on the beat"—in this case, the Chief of Police of the City of Houston, Texas, under Section 28-93 of the Ordinance. Such unbridled discretionary determinations are plainly unconstitutional.

The Ordinance offends both elements of the void-for-vagueness doctrine. On its face the language attempting to define the concept of an "adult arcade" and setting forth the standard with which such an establishment must comply is so imprecise as to provide no fair notice as to what words or conduct would come within its prohibition. See, e.g., *Gooding v. Wilson,* 405 U.S. 518 (1972) ('opprobrious words or abusive language, tending to cause a breach of the peace"); *Coates v. City of Cincinnati,* 402 U.S. 611 (1971) (conduct "annoying to persons passing by"); *Kolender v. Lawson, supra* ("credible and reliable identification"); *Palmer v. City of Euclid,* 402 U.S. 544 (1971) ("wandering" about the streets or being "abroad at late or unusual hours in the night without any visible or lawful business" without being able to give satisfactory account"); *Winters v. New York, supra* (publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime").

Secondly, the open-ended and imprecise language of the Ordinance confers virtually unlimited discretion on the police and other interested City officials to determine what constitutes in any particular circumstances an "adult arcade," thereby entrusting lawmaking "to the moment-to-moment judgment of the policemen on the beat" *Gregory v. City of Chicago,* 394 U.S. 111, 120 (1969) (concurring opinion). "[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). By failing to specify with any degree of certainty what constitutes an "adult arcade" the Ordinance renders it virtually impossible to determine how the standards applicable to such "arcades" should be applied in any given set of circumstances. Such a standardless procedure is the antithesis of the precision required by the First Amendment.

All of the foregoing vagueness issues are not merely problems of metaphysics or linquistics. The situation presented by Ordinance No. 85-1337 is essentially nonsensical.

OVERBREADTH

Under the First Amendment a law is void on its face for overbreadth if it "does not aim specifically at evils within the allowable area of [government] control but * * * sweeps within its ambit other [constitutionally protected] activities * * *." *Thornhill v. Alabama,* 310 U.S. 88, 97 (1940); *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975); *Sawyer v. Sandstrom,* 615 F.2d 311, 315 (5th Cir., 1980). The Ordinance at issue is not readily subject to a limiting construction that would

confine its application to constitutional proportions; indeed, as demonstrated in this case, it has apparently been consistently applied without such a limiting construction by the City of Houston Municipal Court since its enactment.

The overbreadth of this Ordinance can be demonstrated in a variety of ways. First, the Ordinance provides in Section 28-101(a) that every adult arcade must be configured "in such a manner that there is an unobstructed view [from the manager's station] of every area of the adult arcade to which any patron is permitted access for any purpose." The result of imposing this requirement indiscriminately upon both the arcade and its adjoining bookstore is to effectively preclude the sale of any books, magazines or other merchandise. Eliminating the shelving, racks and stands utilized to display merchandise would necessarily require a drastic reduction in inventory and substantially impede the successful merchandising of the books, magazines, films and video tapes sold. The overbreadth of the Ordinance thus has a direct and substantial impact on activities protected by the First Amendment.

The case of *People v. B & I News, Inc.*, 211 Cal. Rptr. 346 (1984) illustrates the flaw. The arcade ordinance in that case required "the entire premises *wherein the pictures are viewed* to be visible upon entering into such premises" (emphasis added). 211 Cal. Rptr. at 348. By contrast, the Houston Ordinance applies to the *entirety* of the business premises, including the bookstore-newsstand portion of the operation, and if enforced literally would require the store to be closed.

Secondly, the lighting requirements prescribed by Section 28-102 of the Ordinance, if applied to ordinary

non-adult theaters, would make it impossible for such theaters to be operated. The end result of the Ordinance's overbreadth in that regard is essentially to prohibit altogether the operation of a business depending only upon the content of the films exhibited.

Third, as a practical matter, the Ordinance appears to criminalize ownership of any building in which coin-operated devices displaying sexually explicit films are operated. Even though the owner of the building may have no interest in the business being operated, and even though the operation of such business is totally beyond any power of control he might exercise, the Ordinance on its face purports to impose penalties merely upon the status of the owner, rather than upon any conduct in which he himself engages. Criminalizing land ownership because of misuse of the premises by tenants is the quintessence of unconstitutional overbreadth and the antithesis of carefully tailored legislation.

Finally, the Ordinance purports to penalize any person who "conducts any business" in a building in which coin-operated devices exhibiting sexually explicit films are operated. "It does not require a strain of the imagination to envision numerous situations where the Ordinance would officially condemn otherwise constitutionally protected conduct." *Dubuisson v. State,* 572 S.W.2d 694, 698 (Tex. Crim. App. 1978). For example, if two otherwise legitimate businessmen agree at a bookstore having adult arcade devices to meet for a business lunch, they have violated the ordinance. For that matter, anyone who buys a newspaper or a magazine at a bookstore has necessarily conducted business in an adult arcade and thereby apparently violated the Ordinance. A tele-

phone repairman making repairs violates the ordinance as does the mailman delivering mail to the store. Such inhibition on all legitimate and even clearly constitutionally protected conduct, simply because it happens to occur in a place where unpermitted arcade devices are located is so obviously constitutionally infirm that no further discussion nor citation of authority is necessary to demonstrate the obvious truism.

The problem is that, rather than aiming its regulative efforts precisely, the City has simply sought to impose a blanket prohibition on any commercial activity of any kind on arcade "premises". Such a prohibition is significantly and fatally overbroad.

This Ordinance is thus a classic violation of the precept that "any government regulation [of First Amendment rights] must be carefully tailored, so that rights are not needlessly impaired." *United Steelworkers of America v. Sadlowski,* 457 U.S. 102, 111 (1982); *Brown v. Hartlage,* 456 U.S. 45, 53-54 (1982). The United States Court of Appeals for the Fifth Circuit held in *Reeves v. McConn,* 631 F.2d 377, 385 (5th Cir., 1980), in invalidating a City of Houston ordinance restricting sound amplification devices, that "[a]n absolute and city-wide prohibition of all sound amplification except during nine hours of the day cannot be viewed as 'narrowly tailored to further the State's legitimate interest'." In a similar sense this Ordinance reaches a substantial amount of constitutionally protected conduct and cannot conceivably satisfy the requirement of "narrow specifically" demanded in the regulation of freedom of expression. *N.A.A.C.P. v. Button,* 371 U.S. 415, 433 (1963).

DUE PROCESS AND FREE SPEECH

Far from being a "content-neutral" regulation of speech, the express terms of the Ordinance condition regulation solely upon the *content* and *character* of the films exhibited in the adult arcades to which it applies.

The importance of this discriminatory feature of the regulation in question is exemplified in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) and *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243 (9th Cir. 1982). In *Young*, the Supreme Court of the United States sustained Detroit zoning ordinances imposing geographical limitations on the location of adult movie theatres and requiring that they be licensed. As the Court pointed out,

> "It is true * * * that adult films may only be exhibited commercially in licensed theatres. But that is also true of *all* motion pictures. The city's general zoning laws require *all* motion picture theaters to satisfy certain locational as well as other requirements; we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city. The mere fact that commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating those ordinances" (emphasis added). 427 U.S. at 620.

The Court sustained the geographical restrictions based upon film content upon a legislative determination that a concentration of "adult" theatres "causes the area to deteriorate and become a focus of crime, effects which

are not attributable to theatres showing other types of films." 427 U.S. at 71, n.34. In the present case, there is absolutely no legislative fact-finding that the deleterious effects sought to be minimized are in any way related to the display of "adult" films in arcades. Logically, such an assumption would be nonsensical; there would seem to be no reason why it would be more difficult to extricate oneself from a burning booth exhibiting a sexually explicit film than from one displaying "Heidi".

Similarly, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) the Court upheld a zoning ordinance similar to that involved in *Young,* crediting legislative and judicial findings that "the location of adult theatres has a harmful effect on the area and contributes to neigborhood blight." 475 U.S. 41.

In the present case, by contrast, the Ordinance before this Court is in no meaningful sense a zoning ordinance and does not in any way regulate the geographical location or density of adult theatres or similar businesses. Instead, the Ordinance purports to promote health and fire safety *only* in establishments exhibiting adult films. All other establishments of a similar configuration, exhibiting non-adult films by means of so-called "arcade devices," are not regulated at all. Thus, rather than being essentially "content-neutral," the Ordinance expressly predicates its regulative proscriptions upon the content of the motion pictures exhibited.

Such discrimination in the context of the First Amendment is both irrational and presumptively unconstitutional. The City's citation of *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir., 1982) demonstrates this flaw. In *Ellwest* the Ninth Circuit upheld a Phoenix,

Arizona arcade ordinance that by its terms applied "to *all* enclosed video viewing booths regardless of the type of film shown. Its reach is not limited to booths in which 'adult' films are displayed." 681 F.2d at 1245, n.2 (emphasis added). Fire safety and public health considerations simply do not demand that only adult movies be subject to ordinance's regulations. Phrased another way, it simply cannot be rationally maintained that an adult arcade otherwise dangerous to the public health or safety can be rendered innocuous simply by changing the character and content of the film images displayed.

The reconfiguration of an adult arcade, as required under the ordinance could effectively require that the business be completely shut down pending the remodeling required by the Ordinance. Such a forced closing, not required of arcades not displaying adult material, constitutes precisely the sort of prior restraint that has been consistently condemned by both the Federal courts and the courts of Texas. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202 (Tex., 1981).

This would be an entirely different case if the City's attempted regulation of arcades were "content-neutral"—that is, dependent only upon the configuration of the booths rather than the content of the films exhibited in them. But such precise, narrowly drawn regulations are not now before this Court. Instead, the City has imposed significant restrictions on the exhibition of *adult* films that have not been imposed upon the exhibition of other motion pictures. Its ostensible reasons for doing so—fire, safety and public health—relate not to content of the films but to the manner of their exhibition, yet no

non-adult arcade is subject to regulation at all. The limitation of this ordinance only to *adult* arcades conclusively establishes that this is not a constitutional valid time, place or manner regulation that can be "justified without reference to the content of the regulated speech * * *." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Accordingly, it is a constitutionally invalid prior restraint on free expression. Moreover, it is arbitrary and irrational since there is no rational basis for regulating configuration and illumination of booths solely on the basis of the character of the films therein displayed. The Ordinance therefore violates due process of law.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner attacked the Ordinance at every opportunity under the First, Fourth and Fourteenth Amendments in the trial court by motions and in the County Court, Court of Appeals and Court of Criminal Appeals in his briefs. The various courts found against the Petitioner.

REASONS FOR GRANTING THE WRIT

This petition for certiorari should be granted for the following reasons:

VAGUENESS — The Court of Appeals has considered Petitioner's facial attack on the ordinance without considering the special status of the Petitioner as a clerk. The Petitioner is the ordinary people for whom the ordinance is supposed to provide notice of conduct proscribed. The ordinance, as applied to clerks, and police officers, e.g., "any person who conducts any business", fails

to provide intelligible notice and direction of the "common usage or understanding" standard under *Kolender v. Lawson,* 461 U.S. 352 (1983).

OVERBREADTH — Is an ordinance overbroad that penalizes any person who conducts any business within a building that houses arcade devices?" The Court should measure whether the ordinance reaches a substantial amount of constitutionally protected conduct", vis-a-vis the clerk-defendant's potential for being victimized by the ambiguities inherent in the ordinance.

DUE PROCESS AND RESTRAINT OF FREE SPEECH — The Court of Appeals has not addressed the requirement under *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

CONCLUSION

Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

FITZGERALD, STAEHELY & YOUNG

CHARLES RICE YOUNG
3401 Louisiana, Suite 440
Houston, Texas 77002
713/520-1719

Attorney for Petitioner

March 1989
Houston, Texas

APPENDIX A

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

November 30, 1988
COA#: 14-88-00441-CR

RE: Case No. 1265-88

STYLE: Molina, Anthony

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail To:

Charles Rice Young
3401 Louisiana, Suite 220
Houston, TX 77002

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

January 25, 1989

COA#: 14-88-00441-CR

RE: Case No. 1265-88

STYLE: Molina, Anthony

On this day the Appellant's Motion for Rehearing was denied.

Thomas Lowe, Clerk

Court of Criminal Appeals
P.O. Box 12308, Capital Station
Austin, Texas 78711

Mail To:

Charles Rice Young
3401 Louisiana, Suite 220
Houston, TX 77002

APPENDIX C

Affirmed and Opinion filed October 27, 1988.

In The
FOURTEENTH COURT OF APPEALS

NO. C14-88-00441-CR

ANTHONY MOLINA, Appellant

v.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal
Court at Law No. 12
Harris County, Texas
Cause No. 2381

O P I N I O N

This is an appeal from an order affirming appellant's conviction for violation of a City of Houston ordinance regulating adult arcades. Issues concern the constitutionality of the ordinance. We affirm.

On August 6, 1985, the City Council of the City of Houston enacted ordinance No. 85-1337 regulating adult arcades. The ordinance acted as an amendment by adding a new Article II to Chapter 28 of the Code of Ordinances of Houston, Texas. The ordinance requires any person who owns, operates, manages or conducts any business in an adult arcade to first obtain a permit from the police chief for that adult arcade. Violation of the ordinance constitutes a misdemeanor punishable by a fine.

Appellant was charged with operating an adult arcade without a permit, in violation of the ordinance. He entered a plea of nolo contendere to the offense charged. The municipal court found appellant guilty and assessed a fine in the amount of $750.00. Appellant then appealed his conviction to the county criminal court at law for appellate review of his conviction. The county court affirmed the conviction.

On appeal to this court, appellant presents five points of error, arguing that the ordinance is unconstitutionally vague, overbroad, violative of due process, preempted by state law and in conflict with certain state laws. We are not persuaded by these arguments and affirm the conviction.

This appeal is identical with previous consolidated appeals decided by this court. *See Martinez v. State,* 744 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1987, pet ref'd.); *Oniyide v. State,* No. C14-88-142-CR (Tex. App.—Houston [14th Dist.] July 21, 1988, pet. filed) (not yet reported). The contentions raised herein by appellant have also been considered and rejected by the First Court of Appeals. See *Rahmani v. State,* 748 S.W. 2d 618 (Tex. App.—Houston [1st Dist.] 1988, pet. filed) and *Lopez v. State,* No. 01-87-01017-CR (Tex. App.—Houston [1st Dist.] July 28, 1988) (not yet reported).

In his first point of error, appellant contends the ordinance in question is vague, and thus in violation of the first and fourteenth amendments to the United States Constitution. Appellant has specific complaints regarding the wording of the adult arcade ordinance. These have been considered and rejected by this court in its previous decision. *Martinez,* 774 S.W.2d at 226-227. For the

reasons set out therein, appellant's first point of error is overruled.

Appellant's second point of error attacks the constitutional validity of the ordinance on the ground that it is overbroad, i.e., that it unnecessarily restricts constitutionally-protected conduct or materials. Again, the arguments presented by appellant have been previously considered by this court and found to be without merit. *Martinez,* 744 S.W.2d at 227-228. Appellant's second point of error is overruled.

In his third point of error, appellant claims the ordinance in question violates due process of law and constitutes an impermissible prior restraint on free speech. According to appellant, the ordinance on its face and as applied to him is not "content-neutral" as required by the first amendment to the United States Constitution. In our previous decision, this court held that the ordinance in question seeks to promote important governmental interests; that those interests are unrelated to the suppression of free expression; and that the incidental restriction on first amendment freedoms is no greater than is essential to the furtherance of such interests. *Martinez,* 744 S.W.2d at 228. Appellant's third point of error is overruled.

In his fourth point of error appellant claims that the ordinance is void under article II, section 5 of the Texas Constitution and the doctrine of preemption because the ordinance conflicts with and is inconsistent with, TEX. REV. CIV. STAT. ANN. arts. 8814 and 8817 (Vernon Supp. 1988).

This court and the First Court of Appeals have held that the ordinance in question does not conflict with, nor is it inconsistent with TEX. REV. CIV. STAT. ANN. arts.

8814 and 8817. In fact, the ordinance, which seeks to regulate the structural configuration and operation of adult arcade business premises, and the state laws, which seeks to provide "comprehensive regulation of music and skill or pleasure coin-operated *machines*," TEX. REV. CIV. STAT. ANN. art. 8817(1) (Vernon Supp. 1988) (emphasis added), serve distinctly different purposes. *Oniyide*, slip op. at 4-5; *Lopez*, slip op. at 2-3. For the reasons set forth in those opinions appellant's fourth point of error is overruled.

In his fifth point of error appellant asserts that the ordinance is void under article II, section 5 of the Texas Constitution and the doctrine of preemption because it conflicts with and is inconsistent with article 2372w, TEX. REV. CIV. STAT. ANN. (now TEX. GOV'T CODE ANN. §§ 243.001-009), as demonstrated by section 28-84(b) of the ordinance. This court and the First Court of Appeals have previously held that there is no conflict between the ordinance and applicable state law and that the doctrine of preemption is not offended by the enactment and operation of the ordinance in question. *Oniyide*, slip op. at 5-6; *Lopez*, slip op. at 3-5. For the reasons set forth at length in those opinions appellant's fifth point of error is overruled.

Accordingly, the judgment of the trial court is affirmed.

/s/ William E. Junell
Justice

Judgment rendered and Opinion filed October 27, 1988.

Panel consists of Justices Junell, Ross A. Sears and Cannon.

Do Not Publish - TEX. R. APP. P. 90.

Supreme Court, U.S.
FILED
APR 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY MOLINA,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

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April 1989

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QUESTIONS PRESENTED FOR REVIEW

1. Is City of Houston Ordinance No. 85-1337 (the "Ordinance") a constitutionally permissible time, place or manner regulation of the interior configuration and lighting of adult arcades?

2. Is the Ordinance unconstitutionally vague or unconstitutionally overbroad on its face or as applied?

3. Is the Ordinance a content-neutral regulation addressing the secondary effects of adult arcades that does not violate due process of law and does not constitute a prior restraint on freedom of speech?

LIST OF INTERESTED PARTIES

1. *Petitioner:* Anthony Molina
2. *Respondent:* the State of Texas

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NO. 88-1614

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY MOLINA,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the State of Texas, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review by this Court of the unpublished opinion of the Fourteenth Court of Appeals of Texas, and the order of the Court of Criminal Appeals of Texas refusing review of that decision.

STATEMENT OF THE CASE

This case involves the constitutionality of a local ordinance that regulates adult arcades, which are defined in terms of premises where entertainment depicting cer-

tain specified sexual activities is dispensed by means of electronic or mechanical arcade devices. The Ordinance requires an unobstructed view from a manager's station of any area of the adult arcade to which patrons have access, and requires a minimum level of lighting for the premises. The Ordinance makes it unlawful for any person to own, operate, manage or conduct any business in an adult arcade unless a permit has been obtained for that adult arcade. Petitioner was adjudged guilty of violating the permit requirement.

The unpublished opinion of the Fourteenth Court of Appeals[1] filed October 27, 1988 (Appendix "C" to the Petition for Writ of Certiorari), correctly states the facts in this case. There is no extended discussion of the facts or law of this case in the unpublished opinion, since the Fourteenth Court of Appeals found the case to be identical to previous cases upholding the Ordinance, which were decided by both the Fourteenth Court of Appeals of Texas and the First Court of Appeals of Texas in published opinions, to-wit: *Martinez v. State,* 744 S.W.2d 224 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*); *Oniyide v. State,* 756 S.W.2d 370 (Tex. App.—Houston [14th Dist.] 1988, *pet. ref'd*); *Lopez v. State,* 756 S.W.2d 49 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*); and *Rahmani v. State,* 748 S.W.2d 618 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*).[2]

---

1. The copy of the Petition for Writ of Certiorari served on Respondent incorrectly indicates that a writ should be directed to the Court of Appeals for the First Supreme Judicial District of Texas. The decision complained of was actually rendered by the Fourteenth Court of Appeals of Texas. *See,* Appendix "C" to the Petition.

2. The decision in *Rahmani v. State, supra,* is the subject of a similar petition for writ of certiorari to the First Court of Appeals of Texas filed with this Court and served on Respondent on the same date as this Petition was served, March 30, 1989.

REASONS THE PETITION SHOULD BE DENIED

The Ordinance is a constitutionally valid time, place or manner regulation of the secondary effects of adult arcades.

The purpose of the Houston Ordinance regulating the configuration and lighting of adult arcades is to deter sexually related criminal activities occurring in the small, enclosed booths typically found in adult arcades, to protect the health of patrons and employees from sexually transmitted diseases, and to improve egress in the event of fire. *Gordon v. State,* 757 S.W.2d 496 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*); *Lopez v. State,* 756 S.W.2d 49, 51-52 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*). The governmental interests of health and safety that the Houston Ordinance seeks to advance are significant and substantial, *Gordon v. State, supra;* and are unrelated to the suppression of speech. *Martinez v. State,* 744 S.W.2d 224, 228 (Tex. App.—Houston [1st Dist.] 1987, *pet. ref'd*).

In addition to the decisions of the Texas courts of appeals upholding the Ordinance, *supra,* the overwhelming majority of state and federal courts that have reviewed similar ordinances requiring that viewing booths in adult entertainment establishments be open to observation have upheld such regulations against first amendment and other constitutional attacks.[3]

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3. *See,* e.g., *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir. 1982); *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165 (4th Cir. 1986); *Berg v. Health and Hospital Corporation of Marion County, Indiana,* 865 F.2d 797 (7th Cir. 1988); *Broadway Books, Inc. v. Roberts,* 642 F. Supp. 486 (E.D. Tenn. 1986); *Suburban Video, Inc. v. City of Delafield,* 694 F. Supp. 585 (E.D. Wis. 1988); *Postscript Enterprises v. City of Bridgeton,* 699 F. Supp. 1393 (E.D. Mo. 1988); *Doe v. City of Minneapolis,*

The Fifth Circuit Court of Appeals, in a case currently before this Court, has upheld a prohibition on enclosed booths enacted by the City of Dallas, Texas, that is similar to the Houston Ordinance, in accordance with what the Court termed "the prevailing view" that such regulations do not offend the First Amendment. *FW/PBS, Inc. v. City of Dallas,* 837 F.2d 1298, 1304 (5th Cir. 1988), *certiorari granted,* ____U.S.____, 109 S. Ct. 1309 (1989). In accord with this "prevailing view" that ordinances attempting to deter sexual activity by requiring open viewing booths are valid time, place or manner restrictions that do not violate the first amendment, are decisions from the Fourth, Ninth and Seventh United States Courts of Appeals. *Wall Distributors, Inc. v. City of Newport News,* 782 F.2d 1165 (4th Cir. 1986); *Ellwest Stereo Theatres, Inc. v. Wenner,* 681 F.2d 1243 (9th Cir. 1982); and *Berg v. Health and Hospital Corporation of Marion County, Indiana,* 865 F.2d 797 (7th Cir. 1988). There is no conflict among the circuits that would support the granting of this Petition, but rather general agreement in the reported cases that "open booth" regulations are valid time, place or manner restrictions that do not offend the first amendment.

A. The Ordinance is not unconstitutionally vague.

Contrary to Petitioner's assertions, the terms of the Ordinance are sufficiently definite so that "ordinary people can understand what conduct is prohibited,"

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693 F. Supp. 774 (D. Minn. 1988); *Deluxe Theater & Bookstore, Inc. v. City of San Diego,* 221 Cal. Rptr. 100 (Cal. App. 1985); *Antonello v. City of San Diego,* 93 Cal. Rptr. 820 (1971), *cert. denied,* 404 U.S. 912 (1971); *EWAP, Inc. v. City of Los Angeles,* 158 Cal. Rptr. 579 (Cal. App. 1979); *People v. B&I News, Inc.,* 211 Cal. Rptr. 346 (Cal. App. Dep't Super. Ct. 1984).

and are expressed "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983) (citations omitted). Moreover, "mathematical certainty" in the language of an ordinance is not required. *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972).

The Ordinance contains, *inter alia,* the following definitions, in Section 28-81:

> *Adult arcade* shall mean any 'premises' to which members of the public or members of any club, group or association are admitted and permitted to use one or more 'arcade devices.'
>
> *Arcade device* shall mean any coin or slug operated or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of 'entertainment', that is intended for the viewing of five or fewer persons in exchange for any payment of any consideration.
>
> *Entertainment* shall mean (1) any live exhibition, display or performance, or (2) any still picture(s) or movie picture(s), whether mechanically, electrically or electronically displayed, or (3) any combination of the foregoing, in which the 'specified sexual activities' are depicted.
>
> * * * *
>
> *Operator* shall mean the 'individual' who is principally in charge of the management of the 'adult arcade.'
>
> *Owner or Owners* shall mean the proprietor if a sole proprietorship, all partners (general and limited) if a partnership or all officers, directors and persons holding ten percent (10%) or more of the outstanding shares if a corporation. Provided, however,

> the term 'owner' or 'owners' shall not include any of the aforesaid persons who has given to the 'operator' a statement under oath that the person does not desire to be listed on a permit application under this article and that the person waives any right to any notice that is required or permitted to be given by the City or any officer or agency thereof in connection with the application or permit for the adult arcade under this article.
>
> * * * *
>
> *Premises* shall mean a building, provided that if a building has been physically divided into separate units that each have their own individual means of ingress or egress to the exterior of the building and which are offered by lease or otherwise for separate use and control, then it shall refer to each such separate unit.
>
> *Specified sexual activities* shall mean (1) human genitals in a state of sexual stimulation or arousal, (2) acts of human masturbation, sexual intercourse or sodomy, (3) fondling or other erotic touching of human genitals, pubic regions, buttock or female breast, or (4) any combination thereof.

The offense with which Petitioner was charged is stated in Section 28-91(a) of the Ordinance, which reads as follows:

> Sec. 28-91.
>
> (a) It shall be unlawful for any person to own, operate, manage or conduct any business in an adult arcade unless there is a permit for the adult arcade.

In order to obtain a permit an adult arcade must comply with the design and lighting requirements enumerated in the ordinance:

Sec. 28-101. *View from manager's station.*

(a) If an adult arcade has one manager's station designated pursuant to section 28-93(c) of this Code, then the interior of the adult arcade shall be configured in such a manner that there is an unobstructed view of every area of the adult arcade to which any patron is permitted access for any purpose from that manager's station. If an adult arcade has two or more manager's stations designated pursuant to section 28-93(c) then the interior of the adult arcade shall be configured in such a manner that there is an unobstructed view of each area of the adult arcade to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(b) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in an adult arcade to ensure that the view area specified in subsection (a) remains unobstructed by any merchandise, display racks or other materials at all times that any patron is present in the adult arcade and to ensure that no patron is permitted access to any area of the adult arcade which has been designated as an area in which patrons will not be permitted in the plan filed pursuant to section 28-92(c) of this Code.

Sec. 28-102. *Lighting.*

(a) Each adult arcade shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) foot candle as measured at the floor level.

(b) It shall be the duty of the owners and operator and it shall also be the duty of any agents and

> employees present in an adult arcade to ensure that the illumination (a), above, is maintained at all times that any patron is present in the adult arcade.

The definitions contained in the Ordinance are sufficiently precise and detailed to give fair notice of the conduct proscribed. *Martinez v. State,* 744 S.W.2d 224, 226-27 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*); *accord, Gordon v. State,* 757 S.W.2d 496, 498-99 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*). Petitioner's strained reading of the language of the ordinance attempts to create ambiguities where none exist. The Texas Courts have found no confusion in the penal provisions of the Ordinance regarding which persons are subject to the permit requirement, and have distinguished Petitioner's cited authority, *Sheppard v. Giebel,* 110 S.W.2d 166 (Tex. Civ. App.—Austin 1937, no writ) (cited at p. 6 of the Petition) as follows:

> Clearly, the unlawful activity is owning, operating, managing, or conducting *the business* without a permit, and not owning the building. The party liable is the owner, operator, or manager of the business who has no permit. Unlike *Sheppard,* there is no uncertainty as to who must obtain the permit and bear the penalty of not doing so. (Emphasis in original). *Gordon v. State,* 757 S.W.2d 496, 498 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*).

Petitioner's objections to other terms in the Ordinance simply ignore the plain and unambiguous meaning of the words used. "Dispense," for example, means more than "deal out in portions," although even that meaning is not inaccurate in describing the way video machines operate. "Dispense" also means "to distribute" and "to give," which

in turn can mean "to furnish or serve." Webster's New International Dictionary, Unabridged, 2nd Ed. Under the ordinary meaning of any of these definitions, it is quite clear what "dispensing entertainment" means. *Gordon v. State, supra,* 757 S.W.2d at 498.

Petitioner also attacks the definition of "arcade device" in Section 28-81 of the Ordinance:

> *Arcade device* shall mean any coin or slug operated or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of entertainment, *that is intended for the viewing of five or fewer persons in exchange for any payment of any consideration.* (emphasis added).

The placing of the comma after the word "entertainment" in the above definition makes it clear that the phrase "intended for the viewing of five or fewer persons . . ." refers grammatically to "machine or device," not "entertainment." The argument that a film or tape itself may be intended, over a period of time, to be viewed by large numbers of people is therefore irrelevant, since the definition in question refers to the number of persons that can view the device. *Gordon v. State, supra,* 757 S.W.2d at 498-499.

The phrase "unobstructed view" is equally unambiguous and, when considered in the light of the detailed standards contained in the Ordinance for the issuance of permits, would not encourage arbitrary or discriminatory enforcement. *See, Martinez v. State, supra,* 744 S.W.2d 224 at 227 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*).

Mathematical precision of terms is not required. *Grayned v. City of Rockford, supra,* 408 U.S. 104 at

110; *Stansberry v. Holmes,* 613 F.2d 1285, 1289 (5th Cir. 1980). The Ordinance clearly specifies both the type of activity regulated and the requirement of a permit in terms that are understandable by persons of ordinary intelligence and which do not encourage arbitrary enforcement.

B. The Ordinance is not overbroad.

An ordinance is overbroad if in its reach it prohibits constitutionally protected conduct. *Grayned v. City of Rockford,* 408 U.S. 104, 114 (1972). However, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 800 (1984). Petitioner suggests that the requirement of Section 28-101(a) that all areas of adult arcades be within the unobstructed view of a manager's station would impede or interfere with the sale of books or magazines in any adjoining bookstore on the same premises.

This argument ignores the fact that the Ordinance is a content-neutral regulation that is aimed at serious secondary effects attributable to the configuration of adult arcades. Therefore, any incidental restrictions on arranging inventory should be analyzed under the standards appropriate to time, place or manner regulations. *Rahmani v. State,* 748 S.W.2d 618, 622 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*), *citing, City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986). The Ordinance requires an unobstrued view of the premises from a manager's station because the legislative findings justifying the Ordinance demonstrated a sub-

stantial danger to the public health and safety from enclosed booths and poor lighting in adult arcades.

Petitioner's hypothetical argument fails to take into account that any printed material could be displayed on low shelving or wall racks or other configurations sufficient to leave every area in view of a manager's station. Moreover, under the Ordinance, an arcade can be operated as a separately leased premise with separate means of ingress and egress, thus avoiding any effect at all on a bookstore operation in the same building.

As noted by a Texas court addressing the identical arguments raised by Petitioner before this Court, "[t]he only actual effect of this Ordinance is that patrons of adult arcades will be required to peruse openly, under specified minimum lighting, the entertainment provided." *Rahmani v. State, supra,* 748 S.W.2d at 622.

Petitioner raises another overbreadth argument with regard to Section 28-91(a) of the Ordinance, which makes it unlawful for any person to "own, operate, manage or *conduct any business* in an adult arcade unless there is a permit for the adult arcade." (emphasis added). Petitioner interprets this to mean that any customer making a purchase or any two persons simply discussing an unrelated business transaction would be subject to criminal penalties under the Ordinance, for "conducting any business," and cites this as facially overbroad. However, Petitioner may not, in a facial overbreadth attack, assert the rights of others whose freedom of expression might arguably be deterred by a vague statute, if the statute is "readily subject to a narrowing construction by state courts." *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 60 (1976). The Texas Courts of Appeals that

have considered Petitioner's argument have found that this provision of the Ordinance is not susceptible to the broad construction urged by Petitioner, and have, in fact, narrowed the challenged provision so as to preclude its application to mere customers or persons who might conduct business transactions on the arcade premises that are unrelated to the operation of the arcade. *Martinez v. State, supra,* 744 S.W.2d 224, at 228 (Tex. App.—Houston [14th Dist.] 1987, *pet. ref'd*); *Gordon v. State, supra,* 757 S.W.2d 496, 500 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*); *see also, Tisdale v. State,* 640 S.W. 2d 409, 415 (Tex. App.—San Antonio 1982, *pet. ref'd*).

C. The Ordinance is content-neutral and, therefore, does not violate due process of law and does not constitute a prior restraint on freedom of expression.

Contrary to Petitioner's assertions, the preamble to the Ordinance establishes that the Ordinance is content neutral, because its *predominant* concerns are with certain adverse secondary effects directly and specifically attributable to *adult* arcades. The preamble to the Ordinance is set out, in part, in *Lopez v. State, supra,* 756 S.W.2d 49, at 51 (Tex. App.—Houston [1st Dist.] 1988, *pet ref'd*) and reads as follows:

> WHEREAS, the City Council further finds, that substantial numbers of arrests for sexually related crimes have been made in adult arcade establishments; and
>
> WHEREAS, the City Council further finds that numerous persons treated for sexually transmitted diseases have reported an epidemiology including sexual encounters in adult arcades; and

> WHEREAS, the City Council further finds that adult arcades that are configured with booths represent a greater danger to the patrons and the employees of the establishments in the event of a fire; and
>
> WHEREAS, the City Council finds that the public health, safety and welfare require that adult arcades be configured in such a nammer (sic) that all patrons will be subject to direct observation by the employees thereof and that certain minimal lighting requirements should be imposed in order to discourage the use of adult arcades as places for sexual encounters and to improve egress in the event of a fire; and . . .
>
> WHEREAS, the City Council further finds that licensing of adult arcades should be required to ensure that the establishments are in compliance with the configuration and lighting requirements and to provide a means of accountability to ensure that operators do not knowingly allow their establishments to be used as places of sexual encounter or solicitation . . .

The Ordinance is content-neutral, even though it regulates only "adult" businesses, because it is "*justified* without reference to the content" of the films in adult arcades. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 929 (1986). Moreover, like the zoning ordinance in *Renton*, which regulated only adult theatres, the Houston Ordinance is "narrowly tailored" to affect only the particular category of businesses that the City Council found were conducive to the sexual conduct which the Ordinance addresses, i.e. "adult" arcades.

It is hardly grounds for constitutional attack that an ordinance narrowly regulating businesses exhibiting entertainment of a sexual nature, the premises of which have been found to be the location of casual sexual encounters, does not also address establishments exhibiting "Heidi" or other children's fare. Under the rationale of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) and *Young v. American Mini Theatres*, 427 U.S. 50 (1976), the Ordinance does not offend the first amendment or due process by regulating adult-oriented establishments differently from other kinds of entertainment establishments. *See, Broadway Books, Inc. v. Roberts, supra,* 642 F. Supp. 486, 490 (E.D. Tenn. 1986).

Finally, Petitioner's citations of *Schad v. Borough of Mount Ephraim,* 452 U.S. 61 (1981); *Erznoznik v. City of Jacksonville,* 422 U.S. 205 (1975); and *Iranian Muslim Organization v. City of San Antonio,* 615 S.W.2d 202 (Tex. 1981) are inapposite. *See, Gordon v. State, supra,* 757 S.W.2d 496, 501 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*). These cases, without exception, involved complete bans or wide-ranging prohibitions on protected speech based on the content of that speech. By contrast, the Ordinance is a relatively modest regulation that restricts *only* the manner in which adult arcades are arranged and lighted. The Ordinance does not presume to censor films based on their content. It does not, "ban adult arcades, adult literature or adult entertainment. It merely regulates the *manner* in which an adult arcade may operate." *Gordon v. State, supra,* 757 S.W.2d 496, 501 (Tex. App.—Houston [1st Dist.] 1988, *pet. ref'd*) (emphasis supplied). To characterize the Ordinance as a ban or prior restraint type of censorship of protected speech misconstrues the limited nature of the regulations imposed under the Ordinance.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the Texas Court of Appeals correctly affirmed the Petitioner's conviction under the Ordinance, based on the reasoning of prior published opinions of the Texas courts addressing the identical issues raised in this Petition. The Texas courts have properly upheld the Ordinance against Petitioner's claims of vagueness, overbreadth, due process and prior restraint violations. The Petition should also be denied because there is no conflict among the Circuits, or, indeed, among any of the various state and federal courts, which have uniformly upheld similar regulations on enclosed viewing booth establishments as valid time, place or manner restrictions.

Respectfully submitted,

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